**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

BETTINA WINKLER, by her next friends HELGA DAHM WINKLER and MARVIN WINKLER,

Plaintiff-Appellant,

-vs-

MARIST FATHERS OF DETROIT, INC, d/b/a NOTRE DAME PREPARATORY HIGH SCHOOL AND MARIST ACADEMY,

Defendant-Appellee.

Supreme Court No. 152889

Court of Appeals No. 323511

Lower Court No. 14-141112-CZ

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Nacht & Roumel, P.C.
By: Nicholas Roumel (P37056)
Charlotte Croson (P56589)
101 N. Main Street, Suite 555
Ann Arbor, MI 48104
(734) 663-7550
nroumel@nachtlaw.com
*Attorneys for Plaintiff-Appellant*

Fried Saperstein Abbatt P.C.
By: Harold S. Fried (P13711)
Layne A. Sakwa (P66050)
29800 Telegraph Road
Southfield, MI 48034
(248) 353-6500
*Co-Counsel for Plaintiff-Appellant*

BODMAN PLC
By: James J. Walsh (P27454)
Karen L. Piper (P31706)
Thomas J. Rheaume, Jr. (P74422)
201 W. Big Beaver Road, Suite 500
Troy, MI 48084
(248) 743-6000
jwalsh@bodmanlaw.com
kpiper@bodmanlaw.com
trheaume@bodmanlaw.com
*Attorneys for Defendant-Appellee*

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# DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF

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Appellant Answers:

Appellee Answers: No.

II. Whether the Court of Appeals correctly concluded that consideration of plaintiff's challenge to defendant's admission decision would have impermissibly entangled the trial court in questions of religious doctrine or ecclesiastical polity?

Appellant Answers: No.

Appellee Answers: Yes.

III. Whether the Court of Appeals opinion in *Dlaikan v Roodbeen*, 206 Mich App 591; 522 NW2d 719 (1994), which recognized that religious schools are entitled to the same First Amendment freedoms as other religious organizations, should be overruled by this Court?

Appellant Answers:

Appellee Answers: No.

## INTRODUCTION

Leave to appeal should be denied. A court cannot, consistent with the First Amendment, undertake the resolution of religious controversies committed to an appropriate religious authority. *Serbian E Orthodox Diocese for the United States of America & Canada v Milivojevich*, 426 US 696, 720; 96 S Ct 2372; 49 L Ed 2d 151 (1976). That is precisely the error plaintiff would have this Court make. Marist Fathers of Detroit, Inc, d/b/a, Notre Dame Preparatory High School and Marist Academy ("NDPMA"), a religious school, has exercised its First Amendment right to decide whom it will admit to receive its religious training and indoctrination. The First Amendment commits that decision exclusively to the religious school and a civil court cannot, without violating First Amendment freedoms, review it. A court has no power to determine who will be admitted into a religious school – a power that would be tantamount to establishing a religion. A determination by a court about who should be admitted to a religious school would also violate the First Amendment's guarantee of the free exercise of religion. The Court of Appeals' recognition of these basic principles of the First Amendment, first in *Dlaikan v Roodbeen*, 206 Mich App 591; 522 NW2d 719 (1994), and now here, is dictated by the separation of church and state embodied in the Federal and the Michigan Constitutions.

## ARGUMENT

### I. THE DOCTRINE OF ECCLESIASTICAL ABSTENTION DOES NOT INVOLVE A QUESTION OF A COURT'S SUBJECT MATTER JURISDICTION OVER A CLAIM.

#### A. The ecclesiastical abstention doctrine severely circumscribes the role of civil courts in religious matters.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." US Const, Am I; see also Const 1963, art 1, § 4.[1] The religious freedom clauses of the First Amendment erect the proverbial wall between church and state, a wall that is both "high and impregnable." *Everson v Bd of Ed of Ewing Twp*, 330 US 1, 18; 67 S Ct 504; 91 L Ed 711 (1947). A church cannot be involved in the affairs of the state and the state cannot be involved in the affairs of a church. See *Watson v Jones*, 80 US 679, 730; 20 L Ed 666 (1871), quoting *Harmon v Dreher*, 2 Speer's Equity, 87 ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority."). The religious freedom clauses are designed to prevent "the intrusion of either [government or religion] into the precincts of the other." *Lemon v Kurtzman*, 403 US 602, 614; 91 S Ct 2105; 29 L Ed 475 (1971). Not even the slightest breach can be tolerated. *Id.*

[1] Michigan's Constitution provides:

> Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief. [Const 1963, art 1, § 4.]

"It is well settled that courts, both federal and state, are severely circumscribed by the First and Fourteenth Amendments to the United States Constitution and art. 1, § 4 of the Michigan Constitution of 1963 in resolution of disputes between a church and its members." *Maciejewski v Breitenbeck*, 162 Mich App 410, 413-414; 413 NW2d 65 (1987). Born from the First Amendment, the "ecclesiastical abstention" doctrine developed as a check on the judicial power to decide religious disputes. It originated in the United States Supreme Court's decision in *Watson*, when a dispute arose about the right to use church property. In deciding the dispute, the Supreme Court held that, based on a "broad and sound view of the relations of church and state under our system of laws," courts called upon to decide "questions of discipline, or of faith, or ecclesiastical rule, custom, or law" must accept the decision of the highest church authority. *Watson*, 80 US at 727. The Supreme Court reasoned:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. [*Id*. at 728-729.]

The Supreme Court has since made clear that the ecclesiastical abstention doctrine is not a bar to hearing all church-related disputes. In *Kedroff v St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 US 94; 73 S Ct 143; 97 L Ed 120 (1952), a dispute arose between the Russian Orthodox Church and Russian Orthodox churches located in North America. *Id.* The North American churches declared their independence and asserted their right to use St. Nicholas Cathedral in New York to the exclusion of the Russian Orthodox Church. *Id.* at 105. The North American churches' claim to the property was supported by a New York statute recognizing the independence of North American churches. *Id*. at 97-98. The Supreme Court found nothing that suggested a relinquishment of the Russian Orthodox Church's authority over the administration of the church. *Id.* at 120. Citing *Watson*, the Supreme Court ruled for the Russian Orthodox Church and remanded the matter for further action as deemed necessary, in other words, the prayed-for ejectment of the North American churches from St. Nicholas's cathedral. *Id.* at 121.

The Supreme Court summarized the ecclesiastical abstention doctrine in *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Mem Presbyterian Church*, 393 US 440, 449; 89 S Ct 601; 21 L Ed 2d 658 (1969):

> The First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded. But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free

> development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment of organs of government for essentially religious purposes, School District of Township of Abington, Pa. v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); the Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.

The ecclesiastical abstention doctrine is unquestioned. As this Court has said, "[m]uch has been written and much can be said on this subject, but little that is new can be added . . . ." *Berry v Bryce*, 317 Mich 490, 499; 27 NW2d 67 (1947). "It is enough to say that we have not departed from the rule that in matters of church polity purely ecclesiastical civil courts do not interfere, but when property rights are involved they are to be tested in the civil courts by the civil laws." *Id.* (citation and internal quotation marks omitted).

### B. Subject matter jurisdiction concerns a court's "abstract power" over classes of cases.

The constitutional obligation "of the judiciary is to act in accordance with the constitution and its system of separated powers, by exercising the judicial power and only the judicial power." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 583; 702 NW2d 539 (2005). The "judicial power" of the state is vested exclusively in "one court of justice." Const 1963, art 6, § 13. The Michigan Constitution vests courts in this state with broad jurisdiction. Our circuit courts, for example, have "original jurisdiction in all matters not prohibited by law," *id.*, and our Court of Appeals and Supreme Court have appellate jurisdiction. See *id.*, and Const 1963, art 6, § 10. This Court has defined subject matter jurisdiction – a term synonymous with "original jurisdiction" in this context – as:

> the right of the court to exercise judicial power over that class of cases, not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is

> pending, because of some inherent facts which exist and may be developed during the trial. Richardson v. Ruddy, 15 Idaho 488, 494, 495, 98 P. 842, 844. See, also, Hunt v. Hunt, 72 N.Y. 217, 28 Am.Rep. 129. [*Joy v Two-Bit Corp*, 287 Mich 244, 253-54; 283 NW 45 (1938) (internal quotation marks omitted).]

By statute, circuit courts have "original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by the statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605. Subject matter jurisdiction cannot be waived. It may be raised at any time and "the parties to an action cannot confer jurisdiction by their conduct or action nor can they waive the defense by not raising it." See *Hillsdale Co Sr Servs, Inc v Hillsdale Co*, 494 Mich 46, 51 n 3; 832 NW2d 728 (2013). "The divestiture of jurisdiction, however, is a serious matter and cannot be done except under clear mandate of law." *Leo v Atlas Indus, Inc*, 370 Mich 400, 402; 121 NW2d 926 (1963).

### C. Application of the ecclesiastical abstention doctrine does not involve a question of a court's subject matter jurisdiction.

The question as to whether application of the ecclesiastical abstention doctrine involves a court's "subject matter jurisdiction" must be answered in the negative. Courts have the "abstract power" to hear and decide statutory causes of action such as a claim under the Persons with Disabilities Civil Rights Act ("PWDCRA"), MCL 37.1101 *et seq*. The abstract power to hear cases concerning religious organizations is also undisputed. Religious organizations exist in the civil world. Not every assertion of jurisdiction jeopardizes the First Amendment values guarded by the ecclesiastical abstention doctrine. *Presbyterian Church in the United States*, 393 US at 449. Thus, our civil courts have general jurisdiction over property and contracts cases that concern religious organizations not otherwise prohibited by law. See, e.g., *Kedroff*, 344 US at 97 (noting probable jurisdiction to hear and decide dispute between two religious organizations

concerning the right to use St. Nicholas Cathedral).

However, the ecclesiastical abstention doctrine may "severely circumscribe" a court's exercise of its abstract power to hear and decide cases because a court in a civil action must accept the decision of the highest religious authority to which the issue has been presented. See *Watson*, 80 US at 727 (holding that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."). Not only must courts defer to religious authorities' determinations regarding church matters, a court must also be mindful not to make a forbidden inquiry into internal compliance with religious law and polity. *Milivojevich*, 426 US at 709 ("For where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.").

The Court of Appeals was correct in its holding in *Lamont Community Church v Lamont Christian Reformed Church*, 285 Mich App 602; 777 NW2d 15 (2009), that application of the ecclesiastical abstention doctrine does not divest a court of subject matter jurisdiction. Rather, as *Lamont* held, when applying the ecclesiastical abstention doctrine, "trial courts have jurisdiction to enter a judgment, but the judgment must resolve the matter consistent with any determinations already made by the denomination." *Id.* *Lamont* is consistent with the Supreme Court's order in *Kedroff*, 344 US at 121 (remanding the matter to the trial court for further action deemed necessary consistent with the boundaries of the ecclesiastical abstention doctrine).

That is not to say, however, that the Court of Appeals statement regarding "jurisdiction" in *Dlaikan* was wrong. *Dlaikan* simply stated that where a plaintiff's "claims are so entangled in questions of religious doctrine or ecclesiastical polity that the civil courts lack *jurisdiction* to hear them." *Dlaikan*, 206 Mich App at 594 (emphasis added). *Dlaikan's* reference to "jurisdiction" refers not to the abstract power to hear a class of cases (i.e., a court's "subject matter jurisdiction") but to the power to make a legal decision or judgment on a religious issue prohibited from examination or inquiry by the First Amendment. Indeed, reference to there being a want of "jurisdiction" to decide such issues is common.[2] See, e.g., *Borgman v Bultema*, 213 Mich 684, 703; 182 NW 91 (1921) ("To assume such *jurisdiction* would not only be an attempt by the civil courts to deal with matters of which they have no special knowledge, but it would be inconsistent with complete religious liberty untrammeled by state authority.") (citation omitted and emphasis added); and *Berkaw v Mayflower Congregational Church*, 378 Mich 239, 266; 144 NW2d 444 (1966) ("The unquestioned clincher in all this discussion as to what *Cadman* means is the fact that the almost universal holding of courts in this country is that a civil court has *no jurisdiction over ecclesiastical questions* unless property rights are involved.") (emphasis added).

[2] As *Watson* aptly pointed out, "[t]here is, perhaps, no word in legal terminology so frequently used as the word jurisdiction, so capable of use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application." *Watson*, 80 US at 732.

*Dlaikan* is consistent with *Lamont* in its recitation of the ecclesiastical abstention doctrine.[3] The only significant difference between *Dlaikan* and *Lamont* is whether the doctrine foreclosed further action by the court. In *Dlaikan*, the plaintiffs' claims were so entangled in religious matters that the only appropriate result consistent with the First Amendment was to dismiss the case in its entirety. *Dlaikan*, 206 Mich App at 594. In *Lamont*, on the other hand, the trial court had jurisdiction to declare the parties' respective interests in property provided that such declaration was consistent with the highest religious authority having ruled on such matters. *Lamont*, 285 Mich App at 624. Furthermore, both *Dlaikan* and *Lamont* are consistent with the United States Supreme Court's summary of the ecclesiastical abstention doctrine quoted above from *Presbyterian Church in the United States*.

*Lamont* is also consistent with the Supreme Court's classification of the ministerial exception as an affirmative defense. In *Hosanna-Tabor Evangelical Lutheran Church & Sch v Equal Employment Opportunity Comm*, US 132 S Ct 694; 181 L Ed 2d 650 (2012), the Supreme Court noted that there was a conflict in the Courts of Appeals about whether the ministerial exception is a "jurisdictional bar" or a "defense on the merits."[4] *Hosanna-Tabor*, 132 S Ct at 709, n 4. The Supreme Court held that the exception operates as an affirmative defense:

> We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar. That is because the issue presented by the exception is whether the allegations the plaintiff makes entitle him to relief, not whether the

[3] Compare *Lamont*, 285 Mich App at 617-618 (holding that the trial court was required to defer to the highest governing body entitled to make the decision and lacked the power to inquire whether the church followed its own policy and procedures) with *Dlaikan*, 206 Mich App at 597 ("The salient point in this doctrinal area is that religious organizations are immune from the jurisdiction of civil courts only in matters that are purely ecclesiastical, i.e., pertaining to religious doctrine or church polity.").

[4] Citing a pre-*Hosanna-Tabor* opinion of the Sixth Circuit, the Michigan Court of Appeals held that the ministerial exception is a jurisdictional bar. See *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 173; 756 NW2d 483 (2008).

> court has the power to hear the case . . . District courts have power to consider ADA claims in cases of this sort, and to decide whether the claim can proceed or is instead barred by the ministerial exception. [*Id.* (citations and internal quotation marks omitted)]

The Supreme Court's resolution of the issue aligned with the holdings of the Third, Ninth, and Tenth Circuits that the ministerial exception did not concern a court's subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) (the federal equivalent to MCR 2.116(C)(4)), but concerned the sufficiency of a plaintiff's claim that should be analyzed under Federal Rule of Civil Procedure 12(b)(6) (the federal equivalent to MCR 2.116(C)(8)). In the context of the ministerial exception, the Third and Ninth Circuits reasoned that while the ministerial exception may serve as a barrier to a plaintiff's claims, "it does not affect the court's authority to consider them." *Petruska v Gannon Univ*, 462 F3d 294, 303 (CA 3, 2006); see also *Bollard v California Province of the Society of Jesus*, 196 F3d 940 (CA 9, 1999). Similarly, the Tenth Circuit held that the ecclesiastical abstention is more appropriately considered as a challenge to the sufficiency of a plaintiff's claims, reasoning that "if the church autonomy doctrine applies to the statements and materials on which plaintiffs have based their claims, then the plaintiffs have no claim for which relief may be granted." *Bryce v Episcopal Church in the Diocese of Colorado*, 289 F3d 648, 654 (CA 10, 2002). NDPMA agrees with these authorities and submits that it is appropriate for a Michigan court to review defenses related to the ecclesiastical abstention doctrine under MCR 2.116(C)(8) as opposed to MCR 2.116(C)(4).[5]

[5] NDPMA moved for summary disposition based on the ecclesiastical abstention doctrine under MCR 2.116(C)(4) (lack of subject matter jurisdiction). Nonetheless, this Court may still review the summary disposition ruling under the correct subrule, which NDPMA submits in this case is MCR 2.116(C)(8) (failure to state a claim on which relief can be granted). See *Smith v Kowalski*, 223 Mich App 610, 612 n 2; 567 NW2d 610 (1997).

Moreover, the ecclesiastical abstention doctrine concerns a religious organization's First Amendment rights which, as with other constitutional rights, are subject to ordinary rules of waiver and forfeiture. This Court has made clear that "[n]o procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012) (citation and internal quotation marks omitted). If the ecclesiastical abstention doctrine involved a question of a court's subject matter jurisdiction, the issue could not be waived or forfeited. See *Hillsdale County*, 494 Mich at 51, n 3 (noting that the lack of subject matter jurisdiction can be raised at any time and cannot be waived).

Based on the foregoing, NDPMA submits that the doctrine of ecclesiastical abstention does not involve a question of a court's subject matter jurisdiction over a claim.

## II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT CONSIDERATION OF PLAINTIFF'S CHALLENGE TO NDPMA's ADMISSION DECISION WOULD HAVE IMPERMISSIBLY ENTANGLED THE TRIAL COURT IN QUESTIONS OF RELIGIOUS DOCTRINE OR ECCLESIASTICAL POLITY.

### A. The ecclesiastical abstention doctrine enshrines the First Amendment's guarantees of freedom for religious organizations.

The First Amendment's guarantees of religious freedom prevent government intrusion into all aspects of religious practice. Typical religious practices, for example, worship services, are protected from government interference as are administrative matters that, while not essential to the propagation of the faith, are integral to a church's ability to function as a church. In other words, the religious freedoms guaranteed by the First Amendment encompass the entirety of a church's being. The preeminent authority on the all-encompassing nature of religious freedom in this Country – and the origins of the ecclesiastical abstention doctrine – is the United States

Supreme Court's decision in *Watson*. There, the Supreme Court held that "[t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all individual members, congregations, and officers within the general association, is unquestioned." *Watson*, 80 US at 728-729. The *Watson* opinion radiates "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 US at 116.

From *Watson's* early pronouncement, the ecclesiastical abstention doctrine took shape. Each subsequent opinion on the subject preserved the fundamental concept that a court must abstain from entangling itself into the affairs of a church. For example, in *Gonzalez v Roman Catholic Archbishop of Manila*, 280 US 1; 50 S Ct 5; 74 L Ed 131 (1929), the plaintiff claimed that he was legally entitled to be appointed a chaplain in the Catholic Church, despite the Church's decision that he failed to meet the Church's qualifications. The First Amendment prohibited the inquiry. The Supreme Court reasoned:

> Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise. [*Gonzalez*, 280 US at 16.[6]]

[6] The United States Supreme Court later disavowed the purported "fraud, collusion, or arbitrariness" exception. See *Milivojevich*, 426 US at 712 ("And although references to the suggested exceptions appear in opinions in cases decided since the *Watson* rule . . . no decision of this Court has given concrete content to or applied the 'exception.'").

The ecclesiastical abstention doctrine prohibits inquiry into the regularity of a church's decisions as well as judicial abrogation of such decisions. The proposition was made clear in *Milivojevich*, where the Illinois Supreme Court abrogated the decisions of the Serbian Orthodox Church to remove a Bishop and to reorganize a diocese of the Church into three dioceses. The court deemed the decisions "arbitrary" and inconsistent with the Church's internal laws and procedures. *Milivojevich*, 426 US at 712-713.

The Supreme Court held that inquiry into and judicial substitution for the Church's decisions was unprecedented. There can be no "arbitrary" exception, the Court wrote, because "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Id.* at 713. Reviewing a church's decision for arbitrariness necessarily requires "inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question." *Id.* The inquiry was absolutely prohibited by the First Amendment for it was "exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them." *Id.*

In *Hosanna-Tabor*, the Supreme Court considered whether the First Amendment rights of a church to select its ministers are infringed by a lawsuit alleging employment discrimination. *Hosanna-Tabor*, 132 S Ct at 705. The Supreme Court held that they were. "The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a

mere employment decision." *Id.* at 706. Further, the Supreme Court held

> ***Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.*** By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions. [*Id.* (emphasis added).]

The "spirit of freedom for religious organizations" embodied in *Watson* remains the rule of law today. Against this backdrop, the Court of Appeals opinion must be assessed.

### B. The Court of Appeals correctly held that the First Amendment prevents a civil court from reviewing a religious school's decision regarding the admission of a student.

It is a proposition too plain to be contested that the First Amendment provides religious institutions the absolute right to select its members. NDPMA is a religious institution. It is administered by clergy, under the general supervision of the Archdiocese of Detroit, and aids in the development of its students' "Christian conscience through an understanding and appreciation of Catholic doctrine, traditions and practices." Notre Dame Preparatory School and Marist Academy, *Mission and Philosophy*, <http://www.ndpma.org/mission-and-philosophy/> (accessed January 25, 2017). NDPMA "strives to create an atmosphere where the student's faith can grow and attempts to provide means and opportunities for participation in faith experiences." *Id*. This omnipresent religious character of NDPMA cannot be subject to judicial oversight or inquiry even if secular matters are also taught or considered during the admission process. Any attempt by a court to meddle in NDPMA's operations would offend the First Amendment. In this regard, the Court of Appeals correctly concluded that consideration of plaintiff's challenge to NDPMA's admission decision would violate NDPMA's inalienable right to select its

members. The Court of Appeals decision is uniformly supported by precedents discussed above and should be affirmed.

Plaintiff's remaining claim is for disability discrimination under the PWDCRA. See generally, Appendix 2.[7] As the Court of Appeals recognized, the crux of plaintiff's complaint is that NDPMA, a religious school, denied her admission. *Winkler v Marist Fathers of Detroit, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 12, 2015 (Docket No. 323511), at *4. As a religious school, the First Amendment provides NDPMA's unbridled discretion to handle matters of church government as well as those of faith and doctrine. The proposition was made clear by the Supreme Court in *Lemon*. What *Lemon* said of religious authority pervading the Catholic school systems fits here: "[t]he substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Lemon*, 403 US at 616.

That courts should abstain from interfering with NDPMA's decisions is "unquestioned." *Watson*, 80 US at 728-729; *Kedroff*, 344 US at 116. The discretion afforded religious institutions extends to deciding who should be admitted into a religious school no less than to deciding the content of religious education and indoctrination. Indeed, *Watson* itself recognized the unbridled authority of a church in selecting its members. *Watson*, 80 US at 730. Simply put, it is a function of the religious authorities operating a school to determine the "essential qualifications" of membership and whether the proposed student possesses them. See *Gonzalez*, 280 US at 16; see also *Maciejewski*, 162 Mich App at 416 (holding that "[i]t is beyond the jurisdiction of the civil courts to determine rights to communion, qualification of members and privileges of membership which are necessary to decide the issues in this case"). To hold otherwise, would be

[7] All references to an Appendix are to Defendant-Appellee's Appendix filed with this Court on February 17, 2016.

a "total subversion" of religious bodies. *Watson*, 80 US at 729.

NDPMA's decision that plaintiff was unqualified for admission cannot be reviewed in this action. As discussed in NDPMA's responsive brief in this Court, a prima facie case under the applicable section of the PWDCRA requires plaintiff to show that she was "qualified" for the educational opportunity sought. See Answer to Application for Leave at 13. In addition to the reasons cited previously, *Milivojevich* makes clear that a court cannot engage in that exercise. A court must accept the decisions of church tribunals. *Milivojevich*, 426 US at 713. It follows that a court must accept the decision of NDPMA that plaintiff was *unqualified* for admission into NDPMA, which entirely undermines plaintiff's PWDCRA claim. Plaintiff asserts that the decision was unjustified, based solely on academic policy, and further that she was the "only Marist student who was denied admission to the high school for the 2014-2015 entering freshman class." See Application for Leave at 5, 17-18. But a court cannot examine the bona fides of NDPMA's decision without running afoul of the First Amendment. *Milivojevich*, 426 US at 713 (holding that the First Amendment prohibits an "inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else in to the substantive criteria by which they are supposedly to decide the ecclesiastical question").[8]

The Court of Appeals decision is also consistent with *Hosanna-Tabor*. Plaintiff's suit seeks admission to NDPMA.[9] See Appendix 2 at ¶ 51; see also Appendix 14. In other words,

[8] See also *Van Vliet v Vander Naald*, 290 Mich 365, 370-371; 287 NW 564 (1939) ("Civil courts will not enter into consideration of church doctrine or church discipline nor will they inquire into the regularity of the proceedings of church tribunals having cognizance of such matters.").

[9] The First Amendment intrusion is not obviated even if plaintiff sought only monetary damages because an award of such relief would penalize NDPMA for exercising its First Amendment rights to qualify members for admission into its religious school. See *Hosanna-Tabor*, 132 S Ct at 709 (holding that it was immaterial that the plaintiff no longer sought reinstatement of her employment because an award of monetary damages "would operate as a penalty on the Church

plaintiff asks a civil court to substitute its judgment for that of the proper church authority. Requiring a church to accept an unwanted student into its religious school, just as requiring a church to accept an unwanted minister in *Hosanna-Tabor*, intrudes upon more than a mere admission decision. The "action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 132 S Ct at 706. By imposing an unwanted student, "the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through" admission into its schools. *Id.* Further, according the state the power to determine who will be admitted into religious schools "also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."[10] *Id.*

Plaintiff's arguments that the admission decision was secular, concerned "no ecclesiastical doctrine or polity," and that her claims can be resolved solely by reference to statutory law are misplaced. See Application for Leave at 16-17. The arguments, if accepted, would eliminate churches' ability to "decide for themselves" matters of church government as well as those pertaining to faith and doctrine. *Kedroff*, 344 US at 116. The inquiry itself would violate the First Amendment. See *National Labor Relations Bd v Catholic Bishop of Chicago*, 440 US 490, 502; 99 S Ct 1313; 59 L Ed 2d 533 (1979) ("It is not only the conclusions that may be reached by the Board which may impinge on the rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."). Further, the notion that NDPMA was required to assert a biblical justification for its admission decision is a hollow

for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination.").

[10] Plaintiff likens her claim to a discrimination claim by a minister against a religious school that was dismissed on non-First Amendment grounds. See Application for Leave at 21 citing *Straman v Minder*, unpublished opinion per curiam of the Court of Appeals, issued September 17, 1996 (Docket No. 164099). *Hosanna-Tabor* destroys that argument.

attempt to divorce NDPMA from its religious roots and the religious freedoms guaranteed by the First Amendment.[11] As far as the First Amendment is concerned, all decisions of NDPMA relating to its organization and governance are considered religious. "Indeed, it is the essence of religious faith that ecclesiastical decisions are reached ***and are to be accepted as matters of faith*** whether or not rational or measurable by objective criteria." *Milivojevich*, 426 US at 714-715 (emphasis added). Religious decisions are simply not subject to review in our courts.[12]

Accordingly, the Court of Appeals correctly held that plaintiff's claim under the PWDCRA involves religious doctrine and ecclesiastical polity outside the purview of a civil court.

## III. *DLAIKAN* PROPERLY RECOGNIZES THAT THE FIRST AMENDMENT APPLIES TO RELIGIOUS SCHOOLS AND THIS HOLDING, IF PROPERLY PRESENTED FOR REVIEW, SHOULD BE AFFIRMED.

The order directing the parties to file supplemental briefs asked the parties to address whether *Dlaikan* should be overruled and, if so, on what basis. NDPMA submits that this Court should not overrule *Dlaikan*, for two reasons. First, *Dlaikan* is not directly before the Court. Second, *Dlaikan* was correctly decided.

In *Dlaikan*, the plaintiffs filed suit against representatives of a parochial school and the school itself challenging the school's decision not to accept their children as students. *Dlaikan*,

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[11] Even assuming the decision was "secular," it cannot be said that – particularly given Father Hindelang's involvement in the decision and the mission of the school to educate students in the Catholic faith – the decision was "unaffected by religious considerations." See, e.g., *Equal Employment Opportunity Comm v The Catholic Univ of America*, 317 US App DC 343, 354 (1996) (applying the ministerial exception to a decision of a secular body of a religious institution and noting that while the minister's qualifications may have been judged against secular criteria, "it [was] by no means clear that its decision was unaffected by religious considerations").

[12] For the same reasons, plaintiff's arguments regarding the fact that NDPMA is willing to admit non-Catholics into its school is irrelevant. NDPMA has the absolute authority to decide who to admit into its school, Catholic and non-Catholics alike.

206 Mich App at 592. Specifically, the plaintiffs brought their "action to challenge the decision of Father Henry Roodbeen, pastor of the Parish of St. Pius X, not to accept plaintiffs' children as students at the parish school for the 1991-92 school year." *Id.* On appeal, Father Roodbeen and St. Pius School challenged the trial court's assertion of jurisdiction.

Before turning to the facts, the *Dlaikan* panel set forth the limitations on resolving such disputes, i.e., the ecclesiastical abstention doctrine. The panel first cited this Court's opinion in *Berry* and the Court of Appeals decision in *Maciejewski*, both of which stand for the rather unremarkable proposition that judicial interference in ecclesiastical affairs of a religious organization is improper. The panel also cited *Natal v Christian & Missionary Alliance*, 878 F2d 1575 (CA 1, 1989), which in turn, cites the Supreme Court cases of *Milivojevich*, *Presbyterian Church in the United States*, *Kedroff*, *Gonzalez*, and *Watson*.

*Dlaikan* then applied the ecclesiastical abstention doctrine. Although labeled as claims for intentional misrepresentation, negligence, and breach of contract, the Court of Appeals looked beyond the form of the complaint to its "substance and effect," which was a challenge to the religious school's admissions decisions. *Dlaikan*, 206 Mich App at 592-593. These claims, the court held, "are so entangled in questions of religious doctrine or ecclesiastical polity that the civil courts lack jurisdiction to hear them." *Id.* at 594. The Court of Appeals reasoned that the First Amendment did not differentiate between archetypal religious doctrine and educational services for purposes of deciding jurisdiction:

> When the claim involves the provision of the very services (or as here refusal to provide these services) for which the organization enjoys First Amendment protection, then any claimed contract for such services likely involves its ecclesiastical policies, outside the purview of civil law. In this regard there can be no distinction between a church providing a liturgical service in its sanctuary and providing education imbued with its religious doctrine in its parochial school. A civil court should avoid foray

> into a property dispute regarding admission to a church's religious or educational activities, the essence of its constitutionally protected function. *Borgman v Bultema*, 213 Mich 684, 703; 182 NW 91 (1921) (expulsion of clergy or members). To do so is to set foot on the proverbial slippery slope toward entanglement in matters of doctrine or ecclesiastical polity. [*Id*. at 593 (internal quotation omitted).]

*Dlaikan* is not properly presented for review in this Court for several reasons. First, plaintiff did not ask this Court (or any other court) to overrule *Dlaikan*. See Application for Leave at 10 (arguing that the Court of Appeals misinterpreted *Dlaikan* and further that its holding is "inconsistent with Michigan jurisprudence interpreting and applying the ecclesiastical abstention doctrine"); see also *id.* at 20 (arguing that *Dlaikan* is distinguishable and not controlling). "Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court." *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Second, plaintiff does not take issue with the underlying law governing the ecclesiastical abstention doctrine cited by *Dlaikan* or advocate for a change in the law. Even assuming such an argument was raised, it would call into question not simply the *Dlaikan* opinion, but well-established constitutional jurisprudence of this Court and the United States Supreme Court. Third, and finally, even if plaintiff or this Court would have applied the ecclesiastical abstention doctrine to the facts presented in *Dlaikan* differently, is of no consequence.[13] The avenue for

[13] *Dlaikan's* specific application of the ecclesiastical abstention doctrine to a contract claim was before this Court last term in the matter of *Pilgrim's Rest Baptist Church v Pearson*, 498 Mich 933; 871 NW2d 715 (2015). In *Pearson*, the Court of Appeals applied *Dlaikan* and held that a pastor's claims for, among other things, breach of contract, were barred by the ecclesiastical abstention doctrine because the contract claims involved "the provision of his services as pastor to the church, which is the essence of the church's constitutionally protected function, and any claimed contract for such services likely involves its ecclesiastical policies, outside the purview of civil law." *Pilgrim's Rest Baptist Church v Pearson*, 310 Mich App 318, 325; 872 NW2d 16 (2015) (citation and internal quotation marks omitted). After hearing argument on the application, this Court denied leave to appeal. *Pilgrim's Rest Baptist Church v Pearson*, 499 Mich 982; 881 NW2d 479 (2016). The issue as to whether a contract that a religious institution

relief from the Court of Appeals holding was a direct appeal to this Court in 1994, not collateral review in 2017.

Moreover, *Dlaikan* was correctly decided and its fundamental holding should be affirmed. *Dlaikan* appropriately recognized that admission decisions into a religious school are vested exclusively with the religious authorities having jurisdiction over such matters. Civil courts are ill-equipped to review such decisions concerning who should be admitted into a religious school.[14] Such recognition is supported by the United States Supreme Court in *Watson* where it was observed:

> Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so. [*Watson*, 80 US at 729.]

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is a signatory to can be examined in a civil court is *not* at issue here as it was in *Dlaikan* or *Pearson*. Rather, this case concerns the right of a religious institution to select its members, which is undeniable.

[14] Judge-made admission standards run the significant risk of creating a benchmark for admission into a religious school. Once created, a religious school's admissions officers would be forced to defer to them at the risk of being further subject to judicial inquiry and civil penalty, a First Amendment problem recognized by the D.C. Circuit in *Catholic Univ of America*, 83 F.3d at 467 ("[W]e think it is fair to say that the prospect of future investigations and litigation would inevitably affect to some degree the criteria by which future vacancies in the ecclesiastical faculties would be filled" because members of the tenure committee would recommend candidates for tenure in order to avoid litigation rather than on personal or doctrinal assessments.").

At its core, *Dlaikan* simply recognizes that First Amendment protections apply to religious schools. *Dlaikan*, 206 Mich App at 593 ("In this regard there can be no distinction between a church providing a liturgical service in its sanctuary and providing education imbued with its religious doctrine in its parochial school."). The holding is neither novel nor even challenged by plaintiff in this appeal. As discussed more thoroughly in NDPMA's answer to plaintiff's application for leave to appeal,[15] religious schools are entitled to First Amendment protections to the same extent as other religious institutions. See, e.g., *Lemon*, 403 US at 616 (holding that Catholic schools involve substantial religious activity and purpose that give rises to entanglement concerns that the First Amendment sought to avoid); see also *Hosanna-Tabor*, 132 S Ct at 710 (holding that a religious school may raise as an affirmative defense to a teacher's lawsuit the ministerial exception to discrimination lawsuits). The principal authority on this subject – the Supreme Court's decision in *Lemon* – recognized that government involvement in Catholic schools is a "relationship pregnant with dangers of excessive government direction of church schools and hence of churches." *Lemon*, 403 US at 620. The relationship is fraught with First Amendment concerns because of the "substantial religious character" of Catholic schools. *Id.* at 618. As the Supreme Court noted, Catholic schools "constitute an integral part of the religious mission of the Catholic Church. The various characteristics of the schools make them a powerful vehicle for transmitting the Catholic faith to the next generation. The process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly." *Id.* at 616. In short, the Supreme Court held that Catholic schools "***involve substantial religious activity and purpose***." *Id.* (emphasis added). As such, and as *Dlaikan* held, the Constitution makes clear that the government must be excluded from the

[15] Answer to Application for Leave at 16-18.

religious school's affairs. See *id.* at 625.

More specific examples from other jurisdictions are in accord with *Dlaikan's* application of well-settled First Amendment principles. In *In re Vida*, 2015 WL 82717 (Tex App, 2015), the court held that civil courts did not have jurisdiction to adjudicate a lawsuit concerning a child who was not promoted to first grade in a religious school based on the school's secular age requirements because asserting jurisdiction "would impinge upon the Diocese's ability to manage its internal affairs by adopting policies regarding admission requirements for Catholic schools." In *In re St. Thomas High Sch*, 495 SW3d 500 (Tex App, 2016), the plaintiff was expelled from a Catholic high school based on his parent's fabrication of a sexual harassment allegation. *Id.* at 504. The student filed a lawsuit for breach of contract against the school and the trial court entered an injunction allowing the plaintiff to attend the school and to be treated in the same manner as all other students. *Id.* at 505. On appeal, the court held that the trial court lacked jurisdiction to decide the dispute or enter an injunction, reasoning that the ecclesiastical abstention prevented judicial interference with the religious school's internal affairs or governance. *Id.* at 513. Similarly, in *Gaston v Diocese of Allentown*, 712 A2d 757, 760 (Pa 1998), the plaintiffs alleged that their children were expelled from a Catholic school for "discipline problems" without cause. *Id.* at 757. They filed a lawsuit alleging negligent and intentional infliction of emotional distress. *Id.* The court held that the ecclesiastical abstention doctrine barred the lawsuit because it concerned a Catholic school's disciplinary code and review of expulsion decision, both of which involve matters of church doctrine. *Id.* at 760. The court reasoned, the question presented "is not a property or contractual dispute. It is a claim that hints at tort law, but is based on an expulsion decision ratified by a bishop; it is, in our opinion, not receptive to application of neutral principles of law." *Id.* Similar to *Lemon*, *Gaston* explained:

> The parochial school, synonymous with the installation of dogma and discipline in its students, is an integral part of the Roman Catholic Church. The school is a repository for Catholic tradition and scripture; it is so intertwined with the church doctrine that separation is neither pragmatic nor possible. Intrusion into the bishop's decision on matters concerning parochial school discipline and expulsion places this court perilously close to trespassing on sacred ground. [*Id.* at 761.]

*Dlaikan*, and the Court of Appeals decision here, are consistent with these cases in their application of the ecclesiastical abstention doctrine. Equally, they are consistent with all precedents of this Court and the United States Supreme Court. Therefore, *Dlaikan's* fundamental holding that First Amendment freedoms extend to religious schools should be affirmed.[16]

## CONCLUSION

The Court should deny plaintiff-appellant's application for leave to appeal. The Court of Appeals correctly held that NDPMA is entitled to summary disposition. The First Amendment and art 1, § 4 of the Michigan Constitution do not permit a court to adjudicate a claim concerning a religious school's refusal to admit a student.

[16] As discussed in Part I, *supra*, *Dlaikan* only erred to the extent it implies that the ecclesiastical abstention doctrine involves a question of a court's subject matter jurisdiction.

Respectfully submitted,

BODMAN PLC

By:/s/Thomas J. Rheaume, Jr.

James J. Walsh (P27454)
Karen L. Piper (P31706)
Thomas J. Rheaume, Jr. (P74422)
201 W. Big Beaver Road, Suite 500
Troy, MI 48084
(248) 743-6000
Attorneys for Defendant-Appellee
jwalsh@bodmanlaw.com
kpiper@bodmanlaw.com
trheaume@bodmanlaw.com

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## CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2017, I electronically filed the ***Defendant-Appellee's Supplemental Brief and this Certificate of Service*** with the Clerk of the Court using the TrueFiling System which will send notification to all counsel registered electronically.

/s/Thomas J. Rheaume, Jr.
Thomas J. Rheaume, Jr. (P74422)
1901 St. Antoine Street
6th Floor at Ford Field
Detroit, Michigan 48226
(313) 259-7777
Attorneys for Defendant-Appellee